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In the Supreme Court of the United States

OCTOBER TERM, 1957

MONTGOMERY WARD & CO., INC., PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The original opinion of the court below as modified by its supplemental opinion denying petitioner's petition for rehearing (Pet. App. 11A-25a) is reported at 242 F. 2d 497. The findings of fact, conclusions of law, and order of the Board (R. 339-409) are reported at 115 NLRB 645.

JURISDICTION

The decree of the court below was entered on April 5, 1957. Petitioner's petition for rehearing was denied

on April 15, 1957 (R. 440). The petition for a writ of certiorari was filed on July 12, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioner, in violation of the National Labor Relations Act, discriminatorily discharged two employees for union activities.

2. Whether substantial evidence supports the Board's finding that petitioner violated Section 8(a)(1) of the Act by questioning employees concerning their union membership and activities.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151 *et seq.*), are appended to the Petition, pp. 1A-5A.

STATEMENT

I. The Board's Findings of Fact, Conclusions, and Order

The Board found that petitioner (also referred to as "the Company") violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging two employees because of their activities on behalf of the Union[1] and further violated Section 8(a)(1) by questioning employees concerning union membership and attendance at union meetings. The evidentiary support for these findings may be summarized as follows:

A. *The unfair labor practices*

At the outset of a drive to organize the approximately 80 employees in petitioner's store at Binghamton, New

[1] Retail Clerks International Association, Local Union No. 1687, AFL.

York, in June 1954, the Union promptly gained the strong support of employees Frank Felker and Irene Witter (R. 392-393,352-353, 359, 375; 108-111, 151-153, 154, 160). Both Felker and Witter signed membership applications on June 2 or 3, thereafter solicited other employees to join the Union, and attended union meetings (R. 392, 398, 352-353, 359, 375; 108-111, 151-153). At the height of the organizing campaign, between July 16 (when the Union filed a representation petition with the Board) and August 17 (when an election was held in the store), Felker was particularly active in soliciting members, going so far as to lend money to one employee to enable him to join the Union (R. 359, 388, 392; 110, 2-9, 13-14).

During this preelection period, Store Manager Rumble questioned three employees about their union sympathies, membership, and attendance at Union meetings (R. 393; 193-194, 198-199). Approximately two weeks before the election, Department Head DuFour (whose supervisory status is discussed *infra*, pp. 6-8) told an employee that the Company "knew who the head union members were and that they would be taken care of after the election" (R. 103). DuFour also informed him that, if the Union won the election, "certain individuals in the store would be automatically squeezed out," specifically naming Felker as an employee whom petitioner would "squeeze" out through "job elimination, that they could put two jobs two departments together and eliminate that job" (R. 393, 356; 101-103). On about August 6, DuFour warned Felker that "the Company knows all of those that are in favor of the Union and they will lose their jobs," and a few days before the election again told Felker that should the Union be successful the Company would "close the

store" (R. 393, 357; 112, 113). In addition, DuFour repeatedly advised Witter not to "get mixed up" with the Union or she would lose her job (R. 393, 399, 357, 376; 154-157).

Despite DuFour's admonitions, neither Felker nor Witter made any secret of their pro-union views. When asked by DuFour what he thought about the Union, Felker replied that the Union was a good thing because of the protection it would afford the employees (R. 393, 356-357; 111, 304). In reply to DuFour's query whether she had signed a Union card, Witter answered in the affirmative, adding that she had "waited a long time to see this happen" (R. 398-399, 376; 154, 304). In addition, Witter not only conversed openly with a Union organizer at the store under the observation of Store Manager Rumble, but also informed Assistant Store Manager Brancato before the election: "I intend to vote, and you know I intend to vote 'yes'" (R. 375, 355, 399, n. 22; 152-154, 160, 68-69, 211).

In the election on August 17, the Union received a majority of the votes (R. 353; 13-14). For the next two days, Witter wore her union button in the store and on the afternoon of the 19th answered a comment by DuFour by stating: "Yes, and I am proud of that button. I waited a long time to wear one" (R. 399, 376; 304, 155-157, 195). DuFour replied: "I wouldn't have anything to do with the Union or anybody in it, if I were you" (*ibid.*). A few hours later, without prior warning or notice, Witter was discharged by Assistant Store Manager Brancato (R. 399, 376; 157-159). Answering her question as to the reason for the discharge, Brancato said: "Well, I just can't carry you on the payroll any longer. 'You are on a non-basic

payroll" (R. 376; 159). Felker, who had begun a week's vacation on August 16 (returning to the store to vote in the election on August 17), was likewise summarily discharged by Brancato when he reported for work on August 23 (R. 393, 360; 114-117). Store Manager Rumble's parting statement to Felker was: "Frank, I hope you don't hold anything against me. As far as I am concerned, there was nothing wrong with your work" (R. 360; 117).

In an attempt to explain the discharges at the hearing in this case, the Company asserted that Felker's job was eliminated because his department was consolidated with another and that Witter lost her job because of a reduction in force (R. 393-394, 399-400). However, the Company failed to transfer Felker to another available job and advertised for new employees a few days after the discharges, hiring a replacement for Witter within two weeks and for Felker within a month (R. 393-394, 397-398, 400, 378, n. 12; 77, 186-187, 59, 73, 77-78, 205, 246-247). The Company also claimed numerous deficiencies in the work of both Felker and Witter (R. 394-397, 399-400, 361-375, 376-377). After carefully considering the evidence with respect to the alleged shortcomings, the Board found them to be either slight or without substance (R. 394-397, 399-400, 361-375, 376-377). It was undisputed that Felker, who had been in the Company's farm equipment department for approximately 12 years, had received several prizes and awards for outstanding sales ability (R. 392, 360-361; 117-122, 60-61, 208, 289, 52). And Witter, who had worked in many of the Company's departments intermittently since 1942 and continuously for four years before her discharge, had previously been recommended by the management as

"an honest and industrious * * * and satisfactory employee", who was "interested in her work" (R. 398, n. 21; 15, 331, 192-193, 185-186).

After "close examination of the record and particularly because the reasons offered by [petitioner] in justification of the discharges" did "not stand up under scrutiny," the Board concluded that petitioner discharged these two employees, not because of economic considerations, but in order to "rid itself of active union proponents" and that its conduct was accordingly violative of Section 8(a)(3) and (1) of the Act (R. 400-401). The Board further concluded that Store Manager Rumble's questioning of employees concerning union membership and activities, viewed against the background of the discriminatory discharges, was violative of Section 8(a)(1) of the Act (R. 401).[2]

B. *The supervisory status of DuFour*

Following the Union's representation petition, the Company and the Union waived a hearing by entering into a stipulation for a consent election which set forth the voting unit as "all employees" in the store, excluding supervisors (R. 388; 5-9). An employee list, furnished by the Company and used for determining voting eligibility, included the name of DuFour, who was permitted to vote in the election without challenge (R. 388-389; 10, 303). Since the Board's Regional Director approved the election agreement between the parties, no hearing was held in the representation pro-

[2] The Board found merit in petitioner's contention that a statement by Assistant Store Manager Brancate to Water was made jokingly, and accordingly dismissed the complaint insofar as it alleged a violation of Section 8(a)(1) in this respect (R. 401).

ceeding and the Board had no occasion to determine DuFour's status (R. 388, 389). The record in the instant complaint proceeding showed, however, that DuFour directed the work of other employees and effectively recommended the hiring and discharge of individuals in his department and that the exercise of his authority was not merely routine or clerical (R. 388, 350-351; 48, 69-70, 79-82, 83-86, 87-92, 93-100, 104, 171, 199-200, 301). Concluding that "the mere fact that DuFour was permitted to vote in the election by agreement of the parties is not the equivalent of a determination of his status by the Board" (R. 389), the Board found that DuFour had a status different from other department heads in the store and was in fact a supervisor within the meaning of Section 2(11) of the Act (R. 388).

A majority of the Board did not adopt the Trial Examiner's finding that petitioner violated Section 8(a)(1) of the Act because of Supervisor DuFour's interrogation and threats (R. 390-391, 404-407, 379-381). Being of the view that statements by supervisors are unlawful only when they reasonably tend to restrain or coerce employees, the Board concluded that there was no intimidation here because DuFour was permitted to vote in the election and the employees would consider him "one of themselves" (R. 390-391). However, the Board unanimously held (R. 390-391, 404-407) that petitioner was not entitled to have the evidence as to DuFour's conduct excluded from the Board's consideration in determining the issues with respect to petitioner's knowledge of the union activities of Felker and Witter, and the reason for their discharge. In this connection, the Board stated (R. 390-391), the important fact was that DuFour was actually "an arm of

management" and "an employer is chargeable with knowledge of union activities acquired by such a supervisor."

C. The Board's order

The Board's order (R. 401-404, 408-409) requires petitioner to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining or coercing its employees in the exercise of their rights under Section 7 of the Act. Affirmatively, the Board ordered petitioner to reinstate Felker and Witter with back pay and to post appropriate notices.

II. The Decision of the Court Below

The court below sustained the Board's findings and enforced its order.

In holding that substantial evidence supported the Board's finding that Felker and Witter were discharged because of union activities, the court rejected petitioner's contention that the Board could not take into account DuFour's knowledge of their union activities and his threats of loss of employment in determining the motives of the supervisors who actually did the discharging (Pet. App. 16A-19A). Stating that "DuFour's supervisory status is clear" (Pet. App. 17A), the court concluded that the Board was entitled to take his conduct and statements into consideration in determining the Company's motives for dismissing the two employees. The court further held that, for the reasons stated by the Board, there was no inconsistency between the Board's action in this respect and the Board's refusal to find petitioner liable for a violation of Section 8(a)(1) on the basis of DuFour's activity

(Pet. App. 17A). The court also held that the inclusion of DuFour in the voting unit did not estop the Board from considering his actual status in the instant proceeding, as neither the Board nor the Regional Director made any definite determination of his status in the representation proceeding (Pet. App. 17A-19A).

In addition, the court found (Pet. App. 19A-20A, 24A) other evidence in the record to support the Board's refusal to adopt petitioner's explanations for the discharges, noting particularly the timing of the discharges, the absence of prior warning or notice, the quickly following advertisement for new employees, the almost immediate replacement, and the lack of substance in petitioner's assertions of incompetence.

And, finally, the court found "warranted by the record" (Pet. App. 20A, 24A-25A) the Board's conclusion that, "in the particular factual setting of this case," Store Manager Rumble's questioning of employees concerning union affiliations was violative of Section 8(a)(1).

ARGUMENT

1. The central issue in this case, as the court below observed, is whether petitioner discharged the two employees for union activity or for reasons of efficiency and economy. The court below, on the basis of the evidence summarized above, pp. 2-6, upheld the Board's findings of unlawful discrimination as adequately supported by the record. Essentially, petitioner's case here is (Pet. 10-21) that the Board's findings are not supported by substantial evidence on the record as a whole and that the court below erred in affirming those findings. Such an issue, as petitioner

acknowledges (Pet. 23), normally raises no question warranting further review by this Court.

More specifically, petitioner's attack upon the adequacy of the evidence supporting the Board's decision rests on the following subsidiary contentions: that the Board's finding of discrimination rests "primarily if not exclusively" on the anti-union remarks of department head DuFour; and that the Board erroneously took those remarks into consideration in determining petitioner's motive for the dismissals since, first, there is no showing that DuFour was representing the views of management and, second, for election purposes the Board had not treated DuFour as a representative of management. Preliminarily, it may be observed that the Board's findings of discrimination do not rest primarily on DuFour's remarks and that, even without those remarks, the other circumstances surrounding the dismissals would have furnished ample basis for the findings of discrimination. But, in any event, since DuFour was in fact a supervisor, as petitioner does not deny, and hence "allied with management" and in a position to know petitioner's real motives (*Packard Motor Co.* v. *National Labor Relations Board*, 330 U.S. 485, 496), the Board could reasonably infer that his statements reflected management's views and that he communicated his knowledge of employee union activity to management. "It must be remembered, in this connection, that the question involved [i.e., of motive] is a pure question of fact; that, in passing upon it, the Board may give consideration to circumstantial evidence as well as to that which is direct; that direct evidence of a purpose to violate the statute is rarely obtainable; and that where the finding of the Board is supported by circumstances from which the

conclusion of discriminatory discharge may legitimately be drawn, it is binding upon the courts * * *." *Hartsell Mills Co.* v. *National Labor Relations Board*, 111 F. 2d 291, 293 (C.A. 4).

Further, there is no inconsistency between the Board's action in this respect and its refusal to attribute DuFour's remarks to management for the purposes of Section 8(a)(1), which prohibits employer interference and restraint of employees in the exercise of their right under the Act. As the Board stated (R. 390):

> When a supervisor is included in the unit by agreement of the Union and the Employer is permitted to vote in the election, the employees obviously regard him as one of themselves. Statements made by such a supervisor are not considered by employees to be the representations of management, but of a fellow employee. Thus they do not tend to intimidate employees. * * * However, a supervisor, although mistakenly permitted to vote in the election by agreement of the parties, remains an arm of management. To the extent, therefore, that an employer's accountability for the conduct of a supervisor does not depend on employee reaction, the employer's responsibility for the supervisor's actions is not affected by the fact of inclusion in the unit. Hence, an employer is chargeable with knowledge of union activities acquired by such a supervisor.

Petitioner's further argument, that the Board was estopped from considering DuFour as an arm of management for purposes of Section 8(a)(3) since he was permitted to vote in the representation election, is in-

substantial. As the court below found (Pet. App. 17A-18A), "neither the Board nor the Regional Director ever made any definite determination of his status" in the representation proceeding since petitioner and the Union waived a hearing in their consent election agreement. This agreement was an "ordinary, private agreement" (*Sun Ship Employees Ass'n v. National Labor Relations Board*, 139 F. 2d 744, 745 (C.A. 3)) and "agreements between private parties cannot restrict the jurisdiction of the Board" (*National Labor Relations Board v. Walt Disney Productions*, 146 F. 2d 44, 48 (C.A. 9)).[3] Contrary to petitioner's suggestion (Pet. App. 15-17), moreover, the circumstances that DuFour's name was improperly included, without objection by the Union, on the voting eligibility list furnished by petitioner, did not alter the fact that he was actually, under the Act, a supervisor. Statutory requirements are " 'not subject to waiver through action or inaction of parties to a labor controversy,' for the Board's duty to enforce the public policy underlying the Act transcends private rights and ordinary principles of contract law" (*National Labor Relations Board v. Southeastern Rubber Mfg. Co.*, 213 F. 2d 11, 15 (C.A. 5)).

The decision below is not in conflict with the decision of the Third Circuit in *National Labor Relations Board v. James H. Matthews & Co.*, 156 F. 2d 706, 708-709 (63 NLRB 273, 280-281, 283), upon which petitioner relies. The *Matthews* case, like the instant case, held that the anti-union statements of supervis-

[3] See also *National Labor Relations Board v. Lake Superior Lumber Corp.*, 167 F. 2d 147, 150 (C.A. 6). Cf. *Wallace Corp. v. National Labor Relations Board*, 323 U.S. 248, 254, affirming 141 F. 2d 87, 91 (C.A. 4).

ors voting in an election do not constitute coercion in violation of Section 8(a)(1), but did not deal with the question of whether such statements may properly be considered for purposes of Section 8(a)(3).

2. Only an issue of fact is raised by petitioner's assertion (Pet. 23-25) that its questioning of employees concerning union membership and activities was non-coercive. The court below sustained as "warranted by the record" (Pet. App. 20A, 24A-25A) the Board's finding that "in the particular factual setting of this case" such interrogation constituted coercive interference with employee rights in violation of Section 8(a)(1) of the Act. That the subjects of the questioning may have characterized petitioner's manner as casual or joking is without consequence, for the coercive character of employer conduct can not be said to depend upon the "degree of introspective perception" held by the employees (*National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U.S. 219, 231).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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